

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON
1400 Eye Street, N.W., Suite 450
Washington, D.C. 20005

Plaintiff,

V.

Civil Action No. _____

U.S. DEPARTMENT OF VETERANS
AFFAIRS,
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Defendant.

**COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, as well as agency FOIA regulations, challenging the failure of the United States Department of Veterans Affairs (“VA”), to fulfill the request of Citizens for Responsibility and Ethics in Washington (“CREW”) for documents relating to guidance regarding the diagnosis of post traumatic stress disorder (“PTSD”) in veterans.

2. This case seeks declaratory relief that defendant is in violation of the FOIA for failing to fulfill plaintiff's request for records, in violation of the FOIA and agency regulations for failing to grant plaintiff's request for a waiver of fees and injunctive relief that defendant immediately and fully comply with plaintiff's request under the FOIA.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal

jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

4. Plaintiff CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of those officials. CREW seeks to empower citizens to have an influential voice in government decisions and in the governmental decision-making process through the dissemination of information about public officials and their actions. To advance its mission, CREW uses a combination of research, litigation and advocacy. As part of its research, CREW uses government records made available to it under the FOIA.

5. CREW has invested considerable organizational resources in pushing the U.S. government to take ethics issues seriously. CREW monitors closely the laws and rules applicable to government agencies.

6. CREW is harmed by the VA's failure to comply with the FOIA because that failure harms CREW's ability to provide full, accurate and current information to the public on a matter of public interest. 5 U.S.C. § 552(a)(6)(c). Absent this critical information, CREW cannot advance its mission of educating the public to ensure that the public continues to have a vital voice in government decisions.

7. CREW will analyze the information it receives that is responsive to its request and will share it with the public through memoranda, reports, or press releases. In addition, CREW will disseminate any documents it acquires from its request to the public through an interactive

website that CREW has founded, www.governmentdocs.org, where members of the public can analyze and comment on public documents. CREW's own website, www.citizensforethics.org, contains links to thousands of pages of documents CREW has acquired from multiple FOIA requests as well as documents relating to CREW's FOIA litigation.

8. Defendant VA is an agency within the meaning of 5 U.S.C. § 552(f). Defendant is the federal agency with possession and control of the requested records and is responsible for fulfilling CREW's FOIA request.

STATUTORY FRAMEWORK

The Freedom of Information Act

9. The FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

10. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether or not to fulfill the request and of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

11. An agency must respond to a FOIA appeal within 20 working days, notifying the appealing party of the agency's determination to either release the withheld records or uphold the denial. 5 U.S.C. § 552(a)(6)(A)(ii).

12. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal, but must provide notice and must also provide "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B).

13. The FOIA also requires each agency to promulgate regulations specifying a fee

schedule for the processing of FOIA requests and establishing procedures and guidelines for the waiver or reduction of fees. 5 U.S.C. § 552(a)(4)(A). Defendant VA's fee waiver regulations are found at 38 C.F.R. § 1.555. Under the FOIA, agencies should produce documents at no charge to the requester or at a reduced charge if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

14. This Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

15. The FOIA provides a mechanism for disciplinary action against agency officials who have acted inappropriately in withholding records. Specifically, when requiring the release of improperly withheld records, if the court makes a written finding that "the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously," a disciplinary investigation is triggered. 5 U.S.C. § 552(a)(4)(F).

FACTS GIVING RISE TO PLAINTIFF'S CLAIMS FOR RELIEF

16. On May 14, 2008, CREW sent a FOIA request to the VA seeking documents relating to the diagnosis of PTSD in veterans. Letter from Anne L. Weismann, CREW, to Department of Veterans Affairs, FOIA/Privacy Act (May 14, 2008) (attached as Exhibit 1). Specifically, CREW requested records "from January 1, 2001, to the present relating to any and all guidance given to any VA staff, consultants and/or other recipient(s) of federal funds regarding the diagnosis of post traumatic stress disorder . . . in veterans." *Id.* CREW's request includes, but is

not limited to, “guidance on (1) whether or not to make a diagnosis of PTSD; (2) alternative diagnoses that should or could be made in lieu of diagnosing PTSD; (3) time or expense factors bearing on a diagnosis of PTSD; and (4) guidance on PTSD diagnoses as they relate to veteran appeals.” Id. CREW also requested a waiver of fees associated with the processing of its request. Id. at 2-3.

17. On May 28, 2008, following a telephone conversation between CREW’s counsel and Lizzette Katilus of the VA, CREW sent a letter memorializing the conversation and expressing CREW’s concerns with the manner in which the VA is handling CREW’s FOIA request. Letter from Anne L. Weismann to Lizzette Katilus (May 28, 2008) (attached as Exhibit 2). Specifically, CREW voiced its concerns with the VA’s position that VA regulations require the agency to search only central offices and pointed out that the plain language of the VA regulations does not support this limitation. Id. at 1. CREW also noted the VA’s refusal to give CREW any guidance on which offices are likely to have responsive records and the agency’s position that “it was up to CREW to narrow its request, with no input or guidance from the VA.” Id. at 2. Finally, CREW noted the VA’s statement that it was going to deny CREW’s request for a fee waiver. Id.

18. By letter dated June 5, 2000, the VA denied CREW’s request for a fee waiver and also claimed the request was “overly broad” and imposed on the VA “an extremely burdensome search effort.” Letter from John Livornese, Director of Records Management Service, Department of Veterans Affairs, to Anne L. Weismann (June 5, 2008) (attached as Exhibit 3).

19. By letter dated June 10, 2007, CREW appealed administratively each of these determinations and requested that the VA immediately grant CREW a fee waiver and process the

request. Letter from Anne L. Weismann to General Counsel Office, Department of Veterans Affairs (June 10, 2008) (“Appeal Letter”) (attached as Exhibit 4). CREW explained how it readily met each of the requirements for a fee waiver.

20. First, the VA’s determination that the records CREW seeks “would not be meaningfully informative” because of the “congressional and media attention” that the diagnosis of PTSD in veterans has already received ignores the abundant evidence that “the records CREW seeks are very much in the current interest of a large segment of the public.” *Id.* at 1-2.

21. Second, the VA’s initial determination that the request is so broadly worded as to include irrelevant records “contort[s] the subject matter of CREW’s request beyond all reason . . .” *Id.* at 2. And the VA’s conclusion that the request is so overly broad as to place an undue burden on the agency goes beyond the FOIA requirement that a request “reasonably describe” the records being sought. *Id.* at 3.

22. As of the filing of this complaint, the VA has neither responded to CREW’s administrative appeal nor produced any documents to CREW in response to CREW’s May 14, 2008 request.

23. CREW has now exhausted its administrative remedies with respect to the processing of CREW’s FOIA request. *See, e.g., Judicial Watch v. Rossoti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) citing 5 U.S.C. § 552(a)(6)(C).

PLAINTIFF’S CLAIMS FOR RELIEF

CLAIM ONE

(Failure to Produce Records Under the FOIA)

24. Plaintiff realleges and incorporates by reference all preceding paragraphs.

25. Plaintiff properly asked for records within the VA's control.

26. Plaintiff is entitled by law to access to the records requested under the FOIA, unless defendant makes an explicit and justified statutory exemption claim.

27. The VA has produced no records to CREW.

28. Therefore, the VA violated FOIA's mandate to release agency records to the public by failing to release the records as plaintiff specifically requested. 5 U.S.C. §§ 552(a)(3)(A), 552(a)(4)(B).

CLAIM TWO
(Improper Denial of Fee Waiver)

29. Plaintiff realleges and incorporates by reference all preceding paragraphs.

30. Plaintiff has demonstrated that it is entitled to a waiver of fees associated with processing its FOIA request because disclosure of responsive records will likely contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the plaintiff.

31. Therefore, defendant violated the FOIA and defendant's own regulations when it failed to grant CREW a fee waiver. 5 U.S.C. § 552(a)(4)(A)(iii); 38 C.F.R. § 1.555.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

(1) Declare that the VA has violated the Freedom of Information Act by failing to lawfully satisfy plaintiff's FOIA request of May 14, 2008;

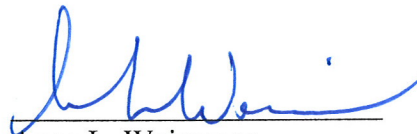
(2) Order the VA to release immediately all records responsive to plaintiff's FOIA request;

(3) Declare that the VA violated the Freedom of Information Act and agency regulations when it determined that plaintiff is not entitled to a waiver of all fees associated with the processing of its FOIA request and declare that plaintiff is entitled to a fee waiver;

(3) Award plaintiff its reasonable attorney fees and litigation costs in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

(4) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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